IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.14 OF 2004

Mahamad Bandu Jamadar (Pathan).. Appellant
(Orig.Defendant)

Versus

1. Balu Sawanta Nawale
2. Neminath Rau Hore
Since deceased through L.Rs:
2/A. Ashok Neminath Hore,
2/B. Shahanabai Rajgonda Patil,
2/C. Sushila Bapu Patil,
2/D. Premlata w/o. Chavagonda Patil..Respondents
(Orig. Plaintiffs)

Shri Walimbe Advocate for the Appellant
Shri Ingale Advocate for the Respondents

CORAM : S.R. SATHE,J.
DATED : 31/07/2007

ORAL JUDGEMENT :-

1. Heard both the learned Advocates.

2. The Appellant-original defendant in regular Civil Suit No.421/1988 has preferred this appeal against the judgement and order passed by the Court of Additional District Judge, Islampur whereby, the order passed by the Trial Court decreeing Plaintiffs' suit for declaration and injunction in his favour was confirmed and the appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as “Plaintiffs” and “defendant”.

3. Plaintiffs filed suit alleging that the suit property bearing block No.888/5C situated at village Walva was purchased by their predecessor Shanta Dari Nawale on 25/02/1929 in auction sale and since then Shanta Dari Nawale and thereafter, Plaintiffs were and are in possession of the suit property. However, in the year 1987, the defendant started obstructing Plaintiffs' possession of the suit land by contending that they have purchased the suit property for Rs.10,000/- from Dhanajirao Thorat on 11/12/1987 by virtue of registered sale deed. Hence, Plaintiffs filed suit for declaration that the sale deed executed in favour of defendant on 11/12/1987 is not binding on the Plaintiffs and that defendant be restrained from obstructing Plaintiffs' possession of the suit land.

4. The defendant filed his Written Statement at Exh-18 and contended that suit land was owned by Shivajirao Narayan Thorat. Forefathers of defendant namely Mirabhai Pathan was in service of Shivajirao Thorat and suit land was given to him by tenancy right as part of his service and after his death, the land is given to the heirs of Mirabhai who was in service of Shivajirao Thorat and then to Dhanajirao and he sold

the said property to defendant. According to defendant, Plaintiffs were not in possession of the said land on the date of the suit. Hence, defendant prayed for the dismissal of the suit.

5. On these pleadings learned Trial Judge framed issues at Exh-31. In order to prove their respective claim both the parties adduced oral and documentary evidence.

6. After considering the said evidence the learned Trial Judge came to the conclusion that the Plaintiffs have proved that the suit land was purchased by Plaintiffs' predecessor Shanta Dari Nawale in Court auction in the year 1929 and since then, the land was in possession of the Plaintiffs' predecessor and thereafter, it is in plaintiffs' possession. The Trial Court also held that the sale deed on the basis of which defendant is claiming title is not in respect of the suit property and the same is not binding on Plaintiffs. He also held that without any legal authority the defendant obstructed Plaintiffs' possession. He, therefore, decreed the Plaintiffs' suit.

7. Being aggrieved by the said order the defendant filed civil appeal No.574 of 1999. However, the same also came to be dismissed.

8. The above mentioned order is challenged by the original defendant in the present second appeal. In this appeal before me, Shri Walimbe learned Advocate for the Appellant submitted that it was necessary for the Plaintiffs to join defendant's vendor in the suit as Plaintiffs had claimed that the Sale Deed executed by him in favour of defendant is not binding on Plaintiffs. He, therefore, submitted that there is substantial question of law involved in the present appeal as to whether the suit is bad for non-joinder of defendant's vendor. As against this, Shri Ingale learned Advocate for the Plaintiffs supported the judgement and order passed by the Courts below and submitted that both the Courts below given the concurrent finding of fact that the Sale Deed executed in favour of defendant is not binding on Plaintiffs and that Plaintiffs were in possession of the suit land and defendant has no right to obstruct Plaintiffs. He, therefore, submitted that the appeal be dismissed.

9. From the perusal of the judgement of the Trial

Court as well as of the First Appellate Court, it is very clear that both the Courts below have held that the suit property was purchased by Plaintiffs' predecessor in Court auction on 25/02/1929 and they were put in possession of the same. This concurrent finding of fact is based on evidence on record. There is nothing to indicate that the said finding is perverse or contrary to law. So, there is no necessity to interfere with the said finding. So, both the Courts below rightly held that on the date of the suit, Plaintiffs were in possession of the suit property.

10. The defendant had based his claimed on the sale deed executed in his favour by Dhanajirao Thorat on 11/12/1987. According to Plaintiffs, said Sale Deed is not binding on them. Firstly, it must be noted that the Courts below have observed that it is not pertaining to the suit property. According to defendant, in order to succeed in the suit it was necessary for the Plaintiffs to join defendant's vendor in the suit. However, it must be noted that once the defendant has based his claim on the sale deed then it obviously means that he has stepped into shoes of vendor. In order to determine whether the property in question was actually owned and possessed by Dhanajirao Thorat, it is not necessary for

the Plaintiffs to implead him in the suit. On the contrary, if it was defendant's contention that he has acquired valid title to the suit property through Dhanajirao Thorat, he could have very well adduced cogent evidence in that behalf. By no stretch of imagination, it can be said that in the suit of the present nature, Dhanajirao Thorat alleged vendor of the defendant is necessary party. Shri Walimbe, learned Advocate for the Appellant has drawn my attention to a case **Dwarka Prasad Singh and others V/s. Harikant Prasad Singh and Others (1973) 1 Supreme Court Cases 179** to show that the vendor is necessary party. I have carefully gone though the above cited rulings. The facts of the said case and the facts of the case in hand are quite different. That was a case where suit was filed for specific performance against vendor contracting to sell the property to Plaintiffs. However, as the defendant No.1 vendor had in fact sold the said property to defendant No.2, Plaintiffs impleaded both of them in suit and sought specific performance against both the defendants and alternatively claimed for return of earnest money. The said suit was decreed in Plaintiffs' favour. Aggrieved by the said decree, three appeals came to be filed. One by Plaintiff and two by the defendants. During the

pendency of the appeal, first defendant i.e. the original vendor died and his heirs were not brought on record. So, question arose whether the joint decree passed by the Trial Court can be effectively modified in the Appellate Court and it was observed that under those circumstances appeal must fail in the absence of heirs of first vendor. However, in the instant case, there was no question of passing any joint decree for specific performance. In fact, suit was simplicitor for declaration and injunction. So, defendant's vendor was not necessary party to the said suit. So, there is no substance in the arguments advanced by the learned Advocate for the Appellant in this behalf. Incidently, it must also be noted here that in the two Courts below, issue with regard to Dhanajirao Thorat being necessary party was not raised and sought by the defendant. Thus, it is very clear that no substantial question of law is in fact involved in the present appeal and there is no necessity to interfere with the decree passed by the Courts below.

Hence, appeal is dismissed in liminie.

(S.R. SATHE, J.)